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In the Supreme Court of the United States

OCTOBER TERM, 1975

DRAYTON CURRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends (1) that the trial court prejudiced his right to a fair trial by informing the jury of the *nolo contendere* pleas of two co-defendants, (2) that the court erred by allowing the government to furnish Jencks Act material in the presence of the jury, (3) that he was prejudiced by the government's failure to produce all requested Jencks Act material, and (4) that it was error for the trial court not to give his requested instruction regarding witnesses who had been granted immunity.

On June 5, 1973, petitioner was indicted with three others in a six-count indictment charging conspiracy to possess heroin with intent to distribute it, possession of heroin with intent to distribute it, and distribution of heroin, in violation of 21 U.S.C. 841(a)(1) and 846. Following a jury trial in the United States District Court for

the Eastern District of North Carolina, petitioner was convicted on all counts and sentenced to a total of 30 years' imprisonment, to be followed by three years' special parole on each of the six counts. The court of appeals affirmed the convictions but remanded for resentencing (Pet. App. 1-16).[1]

The evidence at trial showed that in October 1972, Ellis Sutton, Jr., who was then in prison, asked petitioner to collect a $600 debt that Ben and Joan Brooks owed to Sutton for the purchase of heroin; petitioner agreed to do so (Tr. 11-17). While collecting the debt, petitioner told the Brookses that, although Sutton had no more heroin, petitioner could supply additional drugs (Tr. 50-52, 113-114). On October 29, 1972, the Brookses and others met petitioner and co-defendant Howard Manley at a motel in Hertford, North Carolina, where they observed petitioner and Manley distribute approximately one-quarter kilo of heroin (Tr. 56-62, 115-122). On November 2, 1972, petitioner and Manley visited the Brookses and Tommy Myles in Fayetteville to negotiate the sale of one-eighth kilo of heroin for $3,600 (Tr. 64-67, 123-125). Later that day, the Brookses and Myles telephoned petitioner, who told them that they would be taken care of. Manley then delivered one-eighth kilo of heroin to the Brookses at their motel in Hertford and was paid $3,600 (Tr. 68-70, 125-127).

1. The indictment named petitioner and three co-defendants. One co-defendant, William Swinson, pleaded *nolo contendere* approximately four months prior to trial. A second co-defendant, Willie Curry, pleaded *nolo contendere* during the noon recess on the day the case was called for trial (but before any evidence had been taken), after the jury had been excused from the courtroom. Trial proceeded against petitioner and co-defendant

[1]Petitioner has not yet been resentenced.

Howard Langston Manley. In his opening remarks and again in his closing instructions, the trial judge informed the jury of the *nolo contendere* pleas of co-defendants Swinson and Willie Curry (Tr. 4, 484-485). Petitioner objected to the trial court's instruction (Tr. 472-473, 519).

Petitioner claims that the trial court substantially prejudiced his right to a fair trial by informing the jury of the *nolo contendere* pleas of two co-defendants. However, in order to avoid possible confusion, it was appropriate for the trial judge to explain to the jury why two persons named in the indictment submitted to it—and particularly the one whom the jury may have seen at the defense table at the outset of trial but not thereafter—were not tried with petitioner. The carefully framed cautionary instruction, that the *nolo contendere* pleas of the absent co-defendants were not to be taken as evidence of petitioner's guilt (see Tr. 4, 484-485), amply insulated petitioner from any potential prejudice. See, *e.g.*, *United States* v. *Aldridge*, 484 F.2d 655 (C.A. 7), certiorari denied *sub nom. Good* v. *United States*, 415 U.S. 921; *United States* v. *Earley*, 482 F.2d 53 (C.A. 10), certiorari denied, 414 U.S. 1111; *United States* v. *Aronson*, 319 F.2d 48 (C.A. 2), certiorari denied, 375 U.S. 920; *Wood* v. *United States*, 279 F.2d 359 (C.A. 8).[2]

[2]*United States* v. *Womack*, 454 F.2d 1337, 1346 (C.A. 5), relied upon by petitioner, does not require a different result. There the trial court's decision to inform the jury of the prior conviction of two others named with appellant in five counts of an indictment was held improper (but not necessarily reversible error standing alone) because the guilt of appellant was closely tied to that of his two convicted associates with whom he was intimately involved in a complex scheme to defraud a federally insured savings institution. Here, on the other hand, petitioner was charged with possessing and distributing heroin in five counts of the indictment, while Swinson and Willie Curry were charged in only one count as co-conspirators who purchased the heroin. Thus, the jury's knowledge of the purchasers' guilt, provided in conjunction with extensive cautionary instructions, did not prejudice petitioner. Moreover, in *Womack*, the court agreed that where one of multiple defendants pleads guilty after the commencement of trial (as in effect occurred here in the case of co-defendant Willie Curry), the trial judge might be required to explain that the co-defendant's sudden absence from the courtroom during trial resulted from his guilty plea.

2. Petitioner contends that the trial court committed prejudicial error by allowing the government to furnish Jencks Act material in the presence of the jury, to whom the court then explained the Jencks Act.

While it might ordinarily be better practice for the defense to request Jencks material and the government to produce it in the absence of the jury, the first Jencks request in this case—following the direct examination of Ellis Sutton, Jr.—was made by petitioner's counsel in the jury's presence. Having been asked for Jencks material in open court, the government produced it in open court, and the trial judge, in an effort to keep the jury apprised, briefly explained the Jencks procedure to the jury; petitioner did not object (Tr. 20-21).[3]

Moreover, once petitioner's counsel made use of the Jencks material to cross-examine government witnesses, it was entirely appropriate for the jury to be advised of the source of this material. As the Second Circuit stated in *United States* v. *Gardin,* 382 F.2d 601, 605, upon which petitioner relies:

> * * * If, thereafter, the defendant decides to make use of any of the material for cross-examination of the witness, he will be permitted to do so only upon condition that he state preliminarily to the court and jury that he is about to question the witness on the basis of a written statement or report which the Government has made available to the defendant as required by law. This is to negative any inference that the Government had been covering something up * * * .

[3]Subsequently, following the direct examination of Ben Brooks and Joan Brooks, the government voluntarily surrendered transcripts of each witness's grand jury testimony in the presence of the jury. Petitioner again failed to object to this procedure (Tr. 74-75, 131). After the government's questioning of Tommy Myles, petitioner's counsel entered his first objection to the government's submission of Jencks Act materials in the presence of the jury (Tr. 203). At that time the trial court again briefly explained the requirements of the Jencks Act (Tr. 206). No further Jencks Act materials were supplied in the jury's presence.

As the court below noted (Pet. App. 5-6), in the circumstances of this case there was no likelihood of prejudice from the Jencks procedures employed by the trial court; and thus the court did not abuse its discretion by allowing the government to furnish Jencks material in the jury's presence. See, *e.g., United States* v. *Gonzalez,* 466 F.2d 1286 (C.A. 5); *United States* v. *Nielsen,* 392 F.2d 849 (C.A. 7); *United States* v. *Gardin, supra,* 382 F.2d at 605, n.5.

3. Petitioner next claims prejudice from the government's alleged failure to produce several tape recordings of government interviews with witness Ellis Sutton, Jr. However, all tapes of which petitioner now complains were provided to the trial court for an *in camera* inspection on petitioner's motion for a new trial. After reviewing the tapes, the trial court concluded that only one short segment of one of the tapes contained incidental references to petitioner. The court held that the information on the tapes was substantially identical to that provided petitioner by the government in written transcripts of Sutton's grand jury testimony, and that petitioner therefore could show no prejudice from the government's unintentional failure to provide the tapes at trial.

The court of appeals made an independent review of the tape which contained a brief reference to petitioner and concluded that the trial court was correct in its determination that the government's failure to produce the tapes was, at most, harmless error (Pet. App. 16).

Since Sutton's testimony concerning petitioner's debt collection efforts did not directly implicate petitioner and since only minor differences distinguished the unfurnished tapes from Sutton's grand jury testimony and written statements which were provided to petitioner's counsel, no material improvement in counsel's cross-examination

would have been achieved by knowledge or use of the tapes. Petitioner can show no prejudice requiring reversal. See *United States* v. *Missler*, 414 F.2d 1293, 1303-1304, (C.A. 4), certiorari denied, 397 U.S. 913.

4. At the conclusion of the trial, petitioner asked the trial court to instruct the jury to scrutinize carefully the testimony of witnesses who testified under a grant of immunity. The court declined to instruct as petitioner requested; petitioner made no further objection after the court's charge.

While the trial court did not instruct the jury to scrutinize carefully the testimony of all witnesses who were granted immunity, as petitioner requested, it did instruct that the testimony of an accomplice is "to be received with caution and weighted [*sic*] with great care" (Tr. 508). Since all witnesses who were granted immunity were also accomplices, the jury was effectively instructed to examine carefully the testimony of all witnesses who had been granted immunity. Thus, the substance of petitioner's requested instruction was given, and any error in the failure to give a more specific instruction was harmless.[4]

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[4]The court of appeals held (Pet. App. 7) that on appeal petitioner was required to demonstrate "plain error" because he had not objected to the trial court's instructions after the court had charged the jury. Petitioner argues here (Pet. 12) that after having tendered an instruction that was rejected, he was required to do no more. However, there is authority for the proposition that Rule 30, Fed. R. Crim. P., requires a further objection even by a defendant whose requested instruction has been denied, unless a reviewing court finds that the denial constitutes plain error. See *United States* v. *Leach*, 427 F.2d 1107, 1113 n. 6 (C.A. 1), certiorari denied, 400 U.S. 829; *United States* v. *Taglianetti*, 456 F.2d 1055, 1056-1057 (C.A. 1). Whether this is the proper view of the interrelationship between Rules 30 and 52 of the Federal Rules of Criminal Procedure is irrelevant in this case, however; for, as we have demonstrated, the error, if any, was harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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